LIBRARY
SUPREME COURT, U. S.
MAR 18 1974

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1453

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION et al,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS et al,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

HAROLD BROWN
89 State Street
Boston, Massachusetts 02109
JERRY COHEN
470 Totten Pond Road
Waltham, Massachusetts 02154

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	14
Appendix A	15
Appendix B	29
Appendix C	39

TABLE OF CITATIONS

Cases

Barker v. *Arizona*, 38 L. Ed. 2d 183	14
Barker v. *Wingo*, 407 U.S. 514 (1972)	13
Boddie v. *Connecticut*, 401 U.S. 371 (1971)	8, 9, 10
Burnham v. *Dept. of Public Health*, 349 F. Supp. 1335 (N. D. Ga. 1972)	12
Castro v. *Beecher*, 459 F.2d 725 (1st Cir. 1972)	12, 13
Chambers v. *B. & O. R.R.*, 207 U.S. 142 (1907)	9
Cohens v. *Virginia*, 19 U.S. 6 (Wheat.) 264 (1821)	11
Conley v. *Gibson*, 355 U.S. 41 (1957)	10
Fuentes v. *Shevin*, 407 U.S. 67 (1972)	9
Gautreaux v. *Chicago Housing Auth.*, 304 F. Supp. 736 (N. D. Ill. 1969) *aff'd*, 346 F.2d 306 (7th Cir. 1971), *cert. denied*, 402 U.S. 922 (1971)	13
Haines v. *Kerner*, 404 U.S. 519 (1972), *reh. den.* 405 U.S. 948 (1972)	10
Holt v. *Server*, 442 F.2d 304 (8th Cir. 1971), *aff'g* 309 F. Supp. 362 (E. D. Ark. 1970)	13

Page

Jones v. *Metzger*, 456 F.2d 854 (6th Cir. 1972) 12
Klopfer v. *North Carolina*, 386 U.S. 213 (1967) 9
NAACP v. *Button*, 371 U.S. 415 (1963) 9
Rouse v. *Cameron*, 373 F.2d 451 (D. C. Cir. 1967) 12
Sullivan v. *Little Hunting Park*, 396 U.S. 229 (1969) 11
Taylor v. *Sterret*, 344 F. Supp. 411 (N. D. Tex. 1972) 13
United Mine Workers v. *Illinois Bar Ass'n*, 389 U.S. 217 (1967) 9
United States v. *Montgomery County Board of Education*, 395 U.S. 225 (1969) 12
United States v. *Plaquemines Parish School Bd.*, 291 F. Supp. 841 (E. D. La. 1967), *aff'd as modified*, 415 F.2d 817 (5th Cir. 1969) 13
United States v. *School Dist.*, 151, Cook County, 301 F. Supp. 201 (N. D. Ill. 1969), *aff'd as modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971) 13
Woods v. *Wright*, 334 F.2d 369 (5th Cir. 1964) 10
Wyatt v. *Stickney*, 334 F. Supp. 1341 (N. D. Ala. 1971) 11, 12

Statutes

28 U.S.C. 1254(1) 2
1331 4
1343 4
42 U.S.C. 1983 4

Constitutional Provisions

United States Constitution:
Amendment I 3, 9
Amendment VI 3
Amendment XI 3, 7, 8, 11
Amendment XIV, Section 1 3

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No.

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION et al,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS et al,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, the Ad Hoc Committee on Judicial Administration and Carmen DiCostanzo, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on December 20, 1973.

Opinions Below

The opinions of the District Court and Court of Appeals are not yet reported and appear in Appendices A and B respectively.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on December 20, 1973. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

This Civil Rights Act complaint alleged that inadequate state court facilities create delays of so many years as to effectively deprive petitioners, particularly elderly and poor people among them, of meaningful access to state courts. The relief demanded by the complaint includes ordering state officers to present their own plan for relieving court congestion. The Court of Appeals affirmed dismissal of the complaint on the sole ground that the wrong is not justiciable. The questions presented are:

1. Whether the denial by Respondents of practical access to state courts for resolution of disputes, recovery of property or damages, and defense against civil and criminal complaints is justiciable.

2. Whether the complaint alleging lack of practical access to state courts was properly dismissed.

3. Whether justiciability of a state wrong depends on the possibility that state funds might be used to correct an unconstitutional practice.

4. Whether the sole sanction available to a federal court finding unconstitutional denial of practical access to state courts is a threat to close down a state's judicial system if corrective steps are not taken.

5. Whether Petitioner DiCostanzo should have had the opportunity to show denial of equal protection of the laws to himself and other aged and disadvantaged litigants.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Ch. 42, § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

Petitioners filed a complaint under 42 U.S.C. § 1983 against respondents alleging that Massachusetts failed to provide court facilities, judges, clerical personnel, and other facilities reasonably necessary to protect the plaintiffs' federal constitutional rights of speedy trial, due process and equal protection; that persons charged with crime have been unable to obtain a speedy trial without fault on their part; that parties to civil litigation are required to wait at least two years for a trial without fault on their part, and thus are denied due process of law; that due to court congestion the plaintiff attorneys have been deprived of a forum in which to exercise professional responsibilities to their clients and the public, causing a substantial confiscation of their opportunity to survive economically; that persons of moderate means and of advanced years are economically less able to withstand the attritional effect of delays to the advantage of persons of wealth, thus denying them the equal protection of the laws; that such disadvantaged persons suffer economic loss or physical deprivations while awaiting a "meaningful opportunity to be heard". Jurisdiction was based on 28 U.S.C. § 1331 (federal question) and § 1343 (civil rights) (A. 2-3).

The specific relief sought is that the defendants be ordered to provide for additional court facilities, more judges and clerical employees, and related facilities, and "to implement such programs with adequate funding, all of which is to be performed with reasonable expedition". Additionally, there are prayers that this court "fashion all other orders which may be deemed necessary and appropriate to resolve the judicial crisis" in the state courts, and to retain jurisdiction of the case "in order to supervise the fulfillment of its decrees". (B. 2-3).

The District Court said:

> If these claims appear extravagant, it is well to note that the problem of delay in bringing cases to trial is a matter of deep concern to the Bench as well as the Bar. Over the past few years Chief Justice Tauro of the Massachusetts Supreme Judicial Court has spoken out frequently, warning of the impending deterioration of the judicial process from the failure of the legislative branch to provide the needed judicial manpower and court facilities to assure the prompt and fair administration of justice in the Commonwealth's courts. As recently as September 1972, he said:
>
> > The dismal plight of the Superior Court cannot in any sense support even guarded optimism. In previous reports, I argued at length for the expansion of the Superior Court bench. The situation of the Superior Court has deteriorated rapidly during the past several years. Chief Justice McLaughlin, while arguing forcefully for necessary relief, has been compelled to reduce and even eliminate civil jury sessions of the Superior Court in order to provide constitutionally guaranteed speedy trials in criminal prosecutions.

> The Legislature's Joint Special Committee on Reform of the Judicial System in its Interim Report recommended the addition of thirteen more Superior Court Justices, the maximum number to make full utilization of available Superior Court facilities. The Joint Committee on the Judiciary recommended a more modest, but more likely attainable, increase of five justices. Nevertheless, the Legislature prorogued without providing for any additional justices of the Superior Court.

57 Mass. L.Q. 223-24 (1972). Also, the Executive Secretary of the Supreme Judicial Court, in his report to the Justices of the Court as of June 30, 1971, emphasized:

> 5. There is indeed a crisis in the courts of Massachusetts. No improvements in the management of the business of the courts will provide the relief that additional judges will bring to the judicial system.
>
> • • •
>
> 40. The legal profession has constantly warned the legislative branch of the crisis in Massachusetts courts. It is apparent, however, that no adequate response will be made until the pressure of public opinion forces action that will supply the courts with the judges and supporting personnel, the prosecutors and defenders needed in the criminal justice system.
>
> • • •
>
> 215. The plight of the Superior Court has been discussed at length in the earlier section of this report under heading of Delay in Court. *When*

> *it becomes necessary for the Chief Justice to shut down all civil jury sessions in a large county in order to meet the demands for criminal trials, the situation is more than a crisis, it is a breakdown of the judicial system.* [emphasis added]
>
> * * *
>
> 217. The reports of this office have dwelt constantly on the need for enlargement of the superior court bench and for improvement in its working conditions. Once again the message is repeated in the hope that at long last there will be a response.
>
> Executive Secretary, Fifteenth Annual Report to the Justices of the Supreme Judicial Court, at pp. 3, 9, 40, 41 (Pub. Doc. No. 166, 1971). (A. 11-12) *

The District Court nevertheless dismissed the complaint as nonjusticiable and as barred by the Eleventh Amendment. (A. 10). The Court of Appeals affirmed as to the first ground and did not reach the second ground except to note (B. 3 n. 2) that the Eleventh Amendment bars the action against the Commonwealth eo nomine and may also bar the action against the other Respondents (state officers) since ordering affirmative relief could only be done consistent with the Eleventh Amendment if the state had a constitutionally permissible alternative to incidental appropriation of funds.

The Court of Appeals suggested (B. 3, n. 2) that past affirmative relief cases are distinguishable from the present case because the state had a non-pecuniary alternative in

---

* A special legislative commission has noted the severity of the problem, but to date, there has been no authorization of additional judges, recall of retired judges, or additional court facilities. (See Appendix C for excerpts from legislative report.)

each of those cases and suggested that lack of such an alternative might create an Eleventh Amendment bar. This reasoning extended to the court's analysis of the justiciability issue when it stated:

> Some federal courts have, it is true, involved themselves in the adequate financing of state institutions by ordering a state to furnish certain levels of medical and psychiatric care to those involuntarily committed. But in these cases the courts indicated, either implicitly or explicitly, that unless the specific additional services required in order to pass constitutional muster were provided by the state, the facilities in question would be closed. Here, not only is the court unable to articulate a specific standard of "judicial" services which the constitution is thought to require, but any implied threat to close down the state court system if such a standard were not achieved would amount to little more than a quixotic and unwarranted intrusion into an entire branch of state government. (B. 7)

Reasons for Granting the Writ

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

In *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), this Court specifically reserved the question of boundaries to the fundamental right of a meaningful opportunity to be heard:

> [W]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be

> placed beyond the reach of any individual for . . . in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. 401 U.S. at 382-3.

That right of access is a First Amendment right. *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217. 221 (1967). It extends to small causes as well as great causes and is not confined to any field of human interest. 389 U.S. 217, 223.

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government — *Chambers* v. *B. & O. R.R.*, 207 U.S. 142, 148 (1907). *Accord, NAACP* .v *Button*, 371 U.S. 415, 429-30 (1963).

There is no doubt as to the fundamental nature of the right to a speedy trial in a criminal or civil case as a critical element of the right of access. *Klopfer* v. *North Carolina*, 386 U.S. 213, 223 (1967). *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

It would be anomalous to let stand the ruling of the court below which allows respondents to delay civil trials for recovery of property loss for over four years in the face of a precedent of this Court that few days' detention of a stove and stereo set without prior hearing is impermissible. *Fuentes* v. *Shevin, supra.*

If, as suggested in the concurring opinion in *Boddie, supra,*

> ... the right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court

> today will not withstand analysis. ... (Brennan, J., 401 U.S. at 387-388),

then the petitioners should have had an opportunity to prove that the state has, in effect, withheld that right to be heard and a motion to dismiss should not have been granted, *Conley* v. *Gibson,* 355 U.S. 41 (1957), *Haines* v. *Kerner,* 404 U.S. 519 (1972), reh. den. 405 U.S. 948 (1972).

2. By proving the allegations of the complaint petitioners may show what amounts to a denial of an available working court system—the ultimate form of denial of access. Such a state of affairs, once shown, would present no difficulty in judicial identification of a duty and its breach. It would then be the duty of the district court to act.

> We are fully aware of the reluctance with which federal courts should contemplate the use of the injunctive power to interfere with the conduct of state officers. But when there is a breach of a constitutionally guaranteed right, the duty to exercise the power cannot be avoided. *Woods* v. *Wright,* 334 F.2d 369, 374 (5th Cir. 1964)

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to

exercise our best judgment and conscientiously perform our duty. *Cohens* v. *Virginia,* 19 U.S. 6 (Wheat.) 264, 403 (1821) (Marshall, Ch. J.)

3. The court below was troubled by what it regarded as the unmanageability or unseemliness of "casting a federal district court in the role of receiver for a state judicial branch". However, this characterization misstates the relief sought in the complaint and reflects an unduly narrow view of the flexibility of equitable remedies.

It would be much more appropriate to pass on the nature of any equitable relief to be granted after the case has been tried. It may be that when the case is ended, no injunction against any state proceeding will be asked for or will seem appropriate. Or the injunctive relief in final analysis may come down to very narrow and discreet orders prohibiting precise practices. The bridge of remedies should be crossed only when the precise contours of the problem are established after a trial.

The present case is a Civil Rights Act suit. The existence of a statutory right implies the existence of all necessary and appropriate remedies. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239 (1969). Those remedies need not amount to the "quixotic" intrusion postulated by the court below. In fact, states have formulated their own plans of relief in cases of this kind, e.g., *Wyatt* v. *Stickney,* 334 F. Supp. 1341 (N.D. Ala. 1971), to meet their constitutional duty in a manner minimizing federal intrusion into the performance of such duty, all the while reserving their rights to appeal the underlying judgment. The present complaint follows this method of proven effectiveness.

4. The various bases suggested by the Court of Appeals for distinguishing other affirmative relief cases, both for purposes of Eleventh Amendment immunity and jus-

ticiability analysis are themselves important questions of federal law which should be decided by this court.

The cases, *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1967) and *Wyatt* v. *Stickney*, 334 F.Supp. 1341 (N.D. Ala. 1971); *contra, Burnham* v. *Dept. of Public Health*, 349 F.Supp. 1335 (N.D. Ga. 1972), were distinguished on the ground that federal courts could order the medical facilities involved there to be closed unless the specific additional services required in order to pass constitutional muster were provided by the state. But the Court of Appeals did not state whether less draconian sanctions might be available and effective in the present case. And, in the absence of a trial on the merits, the court was in no position to know the full extent of the problem or its probable solutions.

Moreover, if hospital facilities could be closed in support of the constitutional right to treatment, then the Court of Appeals has rated the constitutional right to treatment as being of greater moment than the right to a court hearing by positing a more restricted scope of remedies for violation of the latter right.

The affirmative relief cases, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969) and *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972), were distinguished on the ground that the present case presents more difficulty in predicting the effect of granting the relief requested. Again, the court did not state the possibility of a district court's shaping the relief within boundaries of predictability defined by a trial on the merits.

Courts have often issued mandatory injunctions requiring expenditures and a reorganization of government functions where necessary to protect fundamental rights. See, e.g., *Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972) (order to reallocate funds so as to provide decent jail

conditions); *Holt* v. *Sarver*, 442 F.2d 304 (8th Cir. 1971), *aff'g* 309 F. Supp. 362 (E.D. Ark. 1970) (requiring organization of staff, alteration of physical plant and introduction of some form of rehabilitation program); *Taylor* v. *Sterret*, 344 F. Supp. 411 (N.D. Tex. 1972) (mandating new prison facilities, programs and procedures, despite the cost); *Gautreaux* v. *Chicago Housing Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1971), *cert. denied*, 402 U.S. 922 (1971) (requiring construction of housing in such a way as to reduce residential segregation); *United States* v. *School Dist. 151, Cook County*, 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd as modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971) (requiring desegregation); *United States* v. *Plaquemines Parish School Bd.*, 291 F. Supp. 841 (E.D. La. 1967), *aff'd as modified*, 415 F.2d 817 (5th Cir. 1969) (requiring board to take fund raising actions), *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) (reversing civil service police selection procedures). The right to a speedy trial is at least as fundamental as any of the rights protected in those other cases.

5. The *Barker* v. *Wingo* doctrine itself should be elaborated for guidance of lower courts.

This term, the Court corrected one misimpression of a state court (shared by the court below in the present case):

> The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim. Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial....

> We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.
>
> *Moore* v. *Arizona*, 38 L.Ed.2d 183, 186.

In the long run, there is more federal state tension inherent in federal case-by-case review of delayed state court proceedings than in acting now to cure the conditions which are common causes of such delay.

6. Petitioners should have had the opportunity to show at a trial on the merits that delayed court proceedings work an invidious discrimination against the elderly and the poor.

Conclusion

For the reasons stated, petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

HAROLD BROWN
89 State Street
Boston, Mass. 02109
JERRY COHEN
470 Totten Pond Road
Waltham, Mass. 02154
Attorneys for Petitioners

March 15, 1974

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 72-3331-M

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION, AN UNINCORPORATED ASSOCIATION OF MASSACHUSETTS ATTORNEYS AND RESIDENTS; AND CARMEN DICOSTANZO, AN INDIVIDUAL
plaintiffs

v.

COMMONWEALTH OF MASSACHUSETTS; THE GENERAL COURT, BEING THE LEGISLATURE OF MASSACHUSETTS; AND FRANCIS W. SARGENT, IN HIS CAPACITY AS GOVERNOR OF MASSACHUSETTS
defendants

MEMORANDUM

MURRAY, D.J. The court is requested in this case to grant relief to plaintiffs based on allegations of the complaint that defendants have failed to provide judicial manpower and adequate court facilities in the courts of the Commonwealth of Massachusetts such as to undermine the judicial process, and thus bring about violations of the speedy trial proviso of the Sixth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The defendants are the Commonwealth of Massachusetts, the General Court of the Commonwealth which "is empowered to enact legislation", and Francis W. Sargent in his capacity as Governor of the Commonwealth who

"has the authority to approve legislation enacted by the General Court and to appoint judges".

The plaintiffs are (1) an unincorporated association of attorneys, presumably confederated together for the purpose of this case, who represent parties in civil and criminal cases pending in the courts of the Commonwealth, and (2) an elderly plaintiff in a civil tort action pending in the Superior Court for the County of Worcester. They purport to represent a class consisting of "all persons in the Commonwealth of Massachusetts" as well as six subgroups named in the complaint.[1]

Plaintiffs bring the complaint under 42 U.S.C. § 1983. Jurisdiction is based on 28 U.S.C. § 1331 (Federal question) and § 1343 (Civil rights). Injunctive and declaratory relief is sought for alleged deprivations of rights secured to the plaintiffs by the United States Constitution. The defendants have moved to dismiss the complaint on various grounds.[2] Certain averments — lack of jurisdiction

---

[1] The subgroups named in paragraph 13 of the complaint are:

a. All defendants in pending criminal proceedings;
b. All parties in all pending civil proceedings;
c. The judicial branch of the Commonwealth of Massachusetts;
d. All persons of moderate or modest means who are litigants in civil or criminal matters, represented by the attorneys in the Ad Hoc Committee on Judicial Administration;
e. All persons of advanced age or in minority and underprivileged groups; and
f. All attorneys admitted to practice law in said Commonwealth.

It is alleged that there are in excess of five million persons in the general class and approximately half that number in the various subclasses. The plaintiffs' burden of proving jurisdiction of the court is, of course, not aided by attempting to bring a great mass of people who in theory may have similar interests in a public question. The plaintiffs must show that the court has jurisdiction apart from the right of joinder under Rule 23, Fed. R. Civ. P. *See Alverez* v. *Pan American Life Insurance Co.*, 375 F.2d 992, 996-97 (5th Cir. 1967).

[2] The grounds are: (1) lack of jurisdiction of the subject matter in that no substantial federal question is alleged; (2) lack of jurisdiction over defendants in that each is immune from suit; (3) complaint fails to state a claim whereon relief can be granted; (4) the

of the subject matter, and failure to state a claim upon which relief can be granted — will be considered as matter of law, taking the allegations of the complaint well pleaded as true.

I

The allegations are that defendants have failed to provide court facilities, judges, clerical personnel, and other facilities reasonably necessary to protect the plaintiffs' federal constitutional rights; that persons charged with crime have been unable to obtain a speedy trial without fault on their part; that parties to civil litigation are required to wait at least two years without a trial without fault on their part, and thus are denied due process of law; that due to court congestion the plaintiff attorneys have been deprived of a forum in which to exercise professional responsibilities to their clients and the public, causing a substantial confiscation of their opportunity to survive economically; that persons of moderate means and of advanced years are economically less able to withstand the attritional effect of delays to the advantage of persons of wealth; that such disadvantaged persons suffer economic loss of physical deprivations while awaiting a "meaningful opportunity to be heard".[3]

---

relief sought is barred by the Tenth and Eleventh Amendments; (5) there are adequate remedies at law for the persons purportedly represented by plaintiffs.

[3] If these claims appear extravagant, it is well to note that the problem of delay in bringing cases to trial is a matter of deep concern to the Bench as well as the Bar. Over the past few years Chief Justice Tauro of the Massachusetts Supreme Judicial Court has spoken out frequently, warning of the impending deterioration of the judicial process from the failure of the legislative branch to provide the needed judicial manpower and court facilities to assure the prompt and fair administration of justice in the Commonwealth's courts. As recently as September 1972, he said:

> The dismal plight of the Superior Court cannot in any sense support even guarded optimism. In previous reports, I argued at length for the expansion of the Superior Court bench. The situation of the Superior Court has deteriorated

It is appropriate to note that the deprivations of federal constitutional rights are alleged to result not from actions authorized or pursued under any statute of the Common-

---

rapidly during the past several years. Chief Justice McLaughlin, while arguing forcefully for necessary relief, has been compelled to reduce and even eliminate civil jury sessions of the Superior Court in order to provide constitutionally guaranteed speedy trials in criminal prosecutions.

The Legislature's Joint Special Committee on Reform of the Judicial System in its Interim Report recommended the addition of thirteen more Superior Court Justices, the maximum number to make full utilization of available Superior Court facilities. The Joint Committee on the Judiciary recommended a more modest, but more likely attainable, increase of five justices. Nevertheless, the Legislature prorogued without providing for any additional justices of the Superior Court.

57 Mass. L.Q. 223-24 (1972). Also, the Executive Secretary of the Supreme Judicial Court, in his report to the Justices of the Court as of June 30, 1971, emphasized:

> 5. There is indeed a crisis in the courts of Massachusetts. No improvements in the management of the business of the courts will provide the relief that additional judges will bring to the judicial system.
>
> * * *
>
> 40. The legal profession has constantly warned the legislative branch of the crisis in the Massachusetts courts. It is apparent, however, that no adequate response will be made until the pressure of public opinion forces action that will supply the courts with the judges and supporting personnel, the prosecutors and defenders needed in the criminal justice system.
>
> * * *
>
> 215. The plight of the Superior Court has been discussed at length in the earlier section of this report under the heading of Delay in Court. When it becomes necessary for the Chief Justice to shut down all civil jury sessions in a large county in order to meet the demands for criminal trials, the situation is more than a crisis, it is a breakdown of the judicial system.
>
> * * *
>
> 217. The reports of this office have dwelt constantly on the need for enlargement of the superior court bench and for improvement in its working conditions. Once again the message is repeated in the hope that at long last there will be a response.

Executive Secretary. Fifteenth Annual Report to the Justices of the Supreme Judicial Court, at pp. 3, 9, 40, 41 (Pub. Doc. No. 166, 1971).

wealth, but rather from certain usages and practices permitted to exist affecting plaintiffs as a result of the continuing failure of the defendants to provide remedies or relief to enable the judiciary to fulfill its obligations under the Constitution of Massachusetts. No injunction is sought to restrain the enforcement, execution or operation of any statute of the Commonwealth,[4] nor is this court requested to declare any statute unconstitutional. No relief is sought for any particular plaintiff in any pending case in the state court on the ground that court is depriving such plaintiff of his federal constitutional rights.

The specific relief sought is that the defendants be ordered to provide for additional court facilities, more judges and clerical employees, and related facilities, and "to implement such programs with adequate funding, all of which is to be performed with reasonable expedition". Additionally, there are prayers that this court "fashion all other orders which may be deemed necessary and appropriate to resolve the judicial crisis" in the state courts, and to retain jurisdiction of the case "in order to supervise the fulfillment of its decrees".

The main arguments of the defendants, as it appeared to the court from their brief and oral argument, are (1) that the complaint fails to raise any substantial federal question or claim upon which relief can be granted, and (2) that the action against defendants is barred by the Eleventh Amendment.

III

The allegations of the complaint must present a substantial justiciable federal question; otherwise, there being no other basis of subject-matter jurisdiction, the complaint must be dismissed. *Ex parte Poresky*, 290 U.S. 34

[4] When the complaint was filed the convening of a three-judge court was requested, and later withdrawn.

(1933); *Brown* v. *Dunne*, 409 F.2d 341, 344 (7th Cir. 1969). It is argued by the plaintiffs that the issue presented by the complaint is not whether an individual charged with a crime, or an aged and indigent civil litigant, has in fact been prejudiced, but rather whether there is denial of such access to the Commonwealth's courts due to congestion of the dockets as to result generally in impermissible consequences under the requirements of due process of law, equal protection of the laws, and speedy trial in criminal cases. On this tender of the issues the inquiry is whether there is thus presented a case "arising under" the Federal Constitution, the laws of the United States, or within the specifically enumerated categories of cases under Article III, Section 2 of the Constitution; and beyond this, if jurisdiction is found, the further question whether the subject matter is appropriate for judicial consideration, that is, whether the case is justiciable.

While the court does have jurisdiction of the case under 28 U.S.C. § 1331 because the claim is alleged to arise under the Constitution, the complaint does not state a justiciable cause of action.

IV

In *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970), in giving the opinion of the Court, Justice Harlan said:

> Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South. As Representative Garfield said: "[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to

> constitute a "custom or usage" with the force of law.
>
> This interpretation of custom recognizes that settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements.

Id. at 167-68. The Court held in that case that "a 'custom, or usage, of [a] State' for purposes of [42 U.S.C.] § 1983 must have the force of law by virtue of the persistent practices of state officials". *Id.* at 167.

It follows from this that unless in the case at bar it can be found that the inaction of the Massachusetts legislature to relieve against undue delay in the courts amounts to a "custom, or usage of [a] State", the plaintiffs have no justiciable cause of action. Looking at the due process and equal protection clauses of the Fourteenth Amendment, and the instances where relief has been granted under them against state officials, the court cannot say there may never be a situation where persistent legislative inaction, by withholding the manpower and facilities necessary to enable the judiciary to function promptly and fairly to administer justice in the courts, would not be found to be such a settled practice as to have the force of law for the purposes of relief under section 1983. As Justice Frankfurter wrote:

> It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.

Nashville, C. & St. L. Ry. v. *Browning*, 310 U.S. 362, 369 (1940).

There is a difference, of course, between official inaction in the sense of neglecting or failing to enforce laws already on the books, and "inaction implicit in the failure to enact corrective legislation". See *Adickes* v. *Kress & Co., supra* at 168, n.39. Even if this court could find that the legislative inaction complained of here was within the scope of section 1983, it should be noted that section protects only rights, privileges, and immunities secured by the Fourteenth Amendment. The plaintiffs have not shown that any of the alleged deprivations of rights claimed by them are traditionally protected by the Fourteenth Amendment.

Under that Amendment the speedy trial provisions of the Sixth Amendment are made binding on the States. The Sixth Amendment, however, imposes no obligation upon the States to fashion procedural rules to prevent or ameliorate undue delay in criminal cases or to protect the rights of criminal defendants. In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Court, after adverting to the fact that "some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right", said:

> We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

Id. at 523. Rather, the Court accepted a balancing test which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis". *Id.* at 530. These prin-

ciples apply in the case at bar. In this connection it should be noted that the speedy trial right of a criminal defendant, although "a more vague concept than other procedural rights", *id.* at 521, is conceptually a more crucial right than a civil litigant's right to a speedy hearing under the due process clause. It follows, *a fortiori*, that the right, if such it is, of the civil litigant, being more amorphous and non-specific, is even less susceptible to definition and protection under the Fourteenth Amendment.

The alleged confiscation of the opportunity of plaintiff attorneys to survive economically states no cause of action under the Fourteenth Amendment. Not only is there a total absence of apposite illustrations or authority brought to the court's attention[5] to support the alleged constitutional claim, it is wholly untenable upon any concept of federalism. A person's privilege to practice law is, of course, protected against state action that contravenes the due process or equal protection clauses of the Fourteenth Amendment. There is no allegation here of any intentional deprivation of the privilege; only the claim of incidental diminution by legislative inaction, not the total denial, of the opportunity of lawyers to maintain a more active (perhaps more viable) current schedule for the trial of their cases. The court is not unmindful that undue delay is a matter of deep concern,[6] but can find no obligation

---

[5] *Haley* v. *Troy*, 338 F. Supp. 794 (D.C. Mass. 1972) dealt with judicial action only and not the rights of lawyers. In *Grace* v. *Howley*, 283 N.E.2d 474 (Ill. 1972), an Illinois "no fault" motor vehicle compensation statute was held to violate the Illinois Constitution. However, the statute did not fall because of its effect on lawyers, but because of its effect on insured persons. Further, there was no holding in the Supreme Court of Illinois of any violation of the United States Constitution.

[6] The court refers to the continuing efforts made by the judges of the Federal Court in this District as added evidence of the concern of the Bench for the delay caused by heavy dockets.

imposed upon the States by the Fourteenth Amendment to provide relief.

No federal question is stated in the claim that persons of moderate means and of advanced years are economically less able to withstand the attritional effect of delays to the advantage of persons of wealth, as a result of delays in bringing their cases to trial. There is no allegation that the disadvantage to persons alleged to be represented by plaintiffs is intentionally caused by defendants or results from any invidious discrimination. Moreover, it is not every disadvantage suffered by an indigent person in the process of litigation that amounts to a denial of due process. The question becomes under the Fourteenth Amendment whether the particular "right" claimed is of such fundamental importance that it should not be denied anyone because of lack of funds. *See Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435 (1967). The claim alleged is not susceptible to definition of such fundamental importance.

To support their claims plaintiffs place reliance upon the legislative reapportionment cases, which involve distribution of political power by a state, *e.g., Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Baker* v. *Carr,* 369 U.S. 186 (1961); *Whitcomb* v. *Davis,* 403 U.S. 125 (1971), and the school desegregation cases, which deal with plans designed to remedy racial discrimination in public schools, *e.g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969); *Green* v. *County School Board,* 391 U.S. 430 (1968); *Brown* v. *Board of Education,* 347 U.S. 483 (1954), for the proposition that this case, like those cited, does not fall into the category of "nonjusticiability". But the significant factors which the Court in *Baker* v. *Carr, supra,* referred to as determining whether a cause is justiciable, and

found in that case, are not present in the case at bar. There Justice Brennan said: "[T]he Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded". *Id.* at 198.

Taking into consideration the factors mentioned, it may readily be seen that the cases relied upon by plaintiffs are in many respects distinguishable from the case at bar. Thus in the reapportionment cases the duty owed plaintiffs was readily identifiable; it was that the state officials owed to the citizens a legislative body chosen in such manner that each citizen's vote was as significant as the next, irrespective of the political district of the state where the citizen resided. Any breach of that duty was easily determinable by examination of both voting districts and census reports, to discover whether some voters had a much more heavily "weighted" vote than others, thus leading to an unconstitutional dilution of certain of the votes. Similarly, the school racial imbalance cases lend themselves to an analysis of census reports and other readily ascertainable facts which reflect the racial make-up of schools in the district and the community. The duty of state officials to provide a unitary school system is well defined and identifiable, and any breach of that duty can be judicially molded.[7] In the case at bar, neither the duty owed nor its breach is easy to identify or determine, much less may relief be granted using manageable judicial standards.[8]

---

[7] *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 11-14 (1971).

[8] Other federal courts have entertained comparable attacks on state court congestion. Thus one court noted:

> Undue delay in bringing cases to trial is, of course, a matter of deep concern to Bench and Bar alike. The expression so frequently used and more frequently misunderstood "justice

V

The Eleventh Amendment clearly bars the action against the named defendant, the Commonwealth of Massachusetts. *Hans* v. *Louisiana*, 134 U.S. 1, 11 (1889). Plaintiffs rely upon *Ex parte Young*, 209 U.S. 123 (1907), for the proposition that this action can be maintained against the legislators and the chief executive of the Commonwealth. The Amendment bars a suit when the State "is the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates". *Ex parte Ayers*, 123 U.S. 443, 506 (1887). Whether the State in any case is the real party defendant must be determined from the nature of the action and the relief demanded. *Ford Motor Co.* v. *Department of Treasury of the State of Indiana*, 323 U.S. 459 (1945). What the plaintiffs seek here is not the enforcement of laws already on the books, but for the legislative branch of the Commonwealth to enact legislation, and, thereafter, for the Governor to execute it. This puts

---

delayed is justice denied" fails to take into consideration the heavy concentration of tort cases in the areas of greatest delays, the time (months and years) apparently required to seek insurance company adjustment, the ultimate institution of suit, the countless mutual adjournments for pleadings and other pretrial procedures, all a part of the strategy adopted by both sides to obtain the best possible settlement, ending only with the frequently traumatic (to counsel) experience of being actually called for trial. These real life situations are not mentioned to indicate any lack of need for greater judicial manpower but only as a preamble to the only issue now before us, namely: can or should a federal court be so presumptuous not only to advise but to direct the legislators of the State of New York and its Executive Officers how to manage the State's judicial affairs.

Kail v. *Rockefeller*, 275 F. Supp. 937, 940 (S.D.N.Y. 1967). *See also Dekosenko* v. *State of New York*, 311 F. Supp. 126 (S.D. N.Y. 1969); *New York State Trial Lawyers* v. *Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967); *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3 (1966).

the case squarely within the proscription of the Eleventh Amendment, and thus bars the action against The General Court and Francis W. Sargent.

Accordingly, the motions of the defendants to dismiss the action are hereby allowed, for failure of the complaint to state a justiciable cause of action, and on the ground that the action against the defendants is barred by the Eleventh Amendment.

(s) FRANK J. MURRAY
United States District Judge

Dated March 30, 1973

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 72-3331-M

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION, AN UNINCORPORATED ASSOCIATION OF MASSACHUSETTS ATTORNEYS AND RESIDENTS; AND CARMEN DICOSTANZO, AN INDIVIDUAL

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL

O R D E R

April 2, 1973

MURRAY, DISTRICT JUDGE

This cause came on to be heard on the defendants' motion to dismiss, and after hearing, and in accordance with the Memorandum of the Court dated March 30, 1973, it is ORDERED that the action be, and it hereby is, dismissed for failure of the complaint to state a justiciable

cause of action, and on the ground that the action against the defendants is barred by the Eleventh Amendment.

By the Court,

(s) Robert J. Smith, Jr.
Deputy Clerk

(s) Frank J. Murray
United States District Judge

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 73-1129

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION ETC., ET AL.,

PLAINTIFFS, APPELLANTS,

v.

COMMONWEALTH OF MASSACHUSETTS ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*, KILKENNY* and CAMPBELL, *Circuit Judges*.

* Of the Ninth Circuit sitting by designation.

Jerry Cohen, with whom *Harold Brown* was on brief, for appellants.
Lawrence T. Bench, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *Walter H. Mayo III*, Assistant Attorney General, were on brief, for appellees.

December 20, 1973

CAMPBELL, *Circuit Judge*. In a class action[1] brought

[1] The class consists of all persons in the Commonwealth and the following subclasses: (1) all defendants in pending criminal proceedings; (2) all parties in all pending civil proceedings; (3) the state's judicial branch; (4) litigants of moderate or modest means represented by attorneys in the Ad Hoc Committee on Judicial Administration; (5) all persons of advanced age or in minority and underprivileged groups; and (6) all members of the Massachusetts bar.

Such a class composition poses problems. The group "all persons in the Commonwealth" most likely contains individuals with interests

under 42 U.S.C. § 1983, plaintiffs allege that Massachusetts' failure to provide "court facilities, judges, clerical personnel, and other facilities" violates their Sixth and Fourteenth Amendment rights. The federal judiciary is asked to order enlargement and restructuring of the entire state court system. Plaintiffs are an unincorporated association of Massachusetts attorneys and an elderly plaintiff in a pending Massachusetts civil suit. The defendants are the Commonwealth of Massachusetts, the state legislature and the governor.

The complaint charges that, through no procrastinating techniques of their own choosing, criminal defendants must wait well beyond one year to obtain a trial, and civil litigants must bide their time at least two years, but frequently four years or more. Such delay is said to deprive civil litigants of liberty and property without due process of law. A due process claim is also asserted on behalf of attorneys forced to endure "substantial confiscation of their opportunity to survive economically." Finally, the complaint alleges that poor and elderly are deprived of equal protection of the laws because such groups are less able to withstand the effects of lengthy delay.

The prayer for relief asks the district court to order

---

adverse to each other and to the class representatives, namely those desiring to retain the present system rather than pay, through higher taxes, for improvements. 3B Moore's Federal Practice ¶23.07[3] (2d ed. 1969). Subclass (1) may be precluded by the Supreme Court's *ad hoc* approach to the right to speedy trial. *Barker* v. *Wingo*, 407 U.S. 514 (1972). Defendants on the street awaiting trial may have interests adverse to those in jail; as witnesses die and memory fades, the prosecutor's burden of proof becomes more difficult. Persons in subclass (2) also may have antagonistic interests since delay arguably benefits civil defendants by making it harder for plaintiffs to win cases, postponing payment until date of judgment, and encouraging settlements. No legal interests were asserted on behalf of subclass (3). Subclasses (4) and (5), in addition to lacking identity of interests, use terms too vague, such as "moderate or modest means" and "advanced age", to define the class. *Chaffee* v. *Johnson*, 229 F. Supp. 445, 448 (S.D. Miss. 1964), *aff'd* 352 F.2d 514 (5th Cir. 1965); *cert. denied* 384 U.S. 956 (1966).

defendants to provide short and long term proposals to alleviate the congestion "and to implement such programs with adequate funding"; it further requests the court to fashion other orders necessary to resolve the court crisis and to retain jurisdiction in order to supervise its decree.

The district court dismissed the complaint for failure to state a justiciable cause of action, and on the ground that the Eleventh Amendment bars the action against defendants. 358 F. Supp. 953 (D. Mass. 1973). We affirm on the first ground.[2]

Courts in Massachusetts, as in many other states, have been overtaken by an explosion of litigation, causing congestion and delays which defy solution even by the most active lawyers and jurists. *See* Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court, the

---

[2] The Eleventh Amendment bars the action against the Commonwealth. *Hans* v. *Louisiana*, 134 U.S. 1 (1890). Although we refrain from deciding the question, the Amendment may also bar relief against the other defendants. Absent waiver, sovereign immunity generally precludes suits against state officers when the relief requested entails a direct levy of execution upon the state treasury, *Hagoid* v. *Southern*, 117 U.S. 52 (1886), or an injunction ordering specific performance of a state's contract. *In re Ayers*, 123 U.S. 443 (1887). If official action is unconstitutional, it does not preclude an injunction to halt such action. *Ex parte Young*, 209 U.S. 123 (1908). Courts have not limited the *Ex Parte Young* doctrine to "negative" relief, and have often ordered positive governmental action. In cases involving deprivation of constitutionally protected rights, "affirmative" relief has been granted, notwithstanding the fact that the incidental effect is that the state will be forced to expend funds from its treasury. *See, e.g. Graham* v. *Richardson*, 403 U.S. 365 (1971); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Inmates* v. *Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973); *Martarella* v. *Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972). However, in the "affirmative" relief cases, *supra*, the state still retains an option to avoid expenditures; it can, for instance, terminate all welfare programs. The Commonwealth, on the other hand, would not appear to have a constitutionally permissible alternative—to shut down al lthe courts rather than spend public funds. It is the lack of such an alternative that may create an Eleventh Amendment bar. *Cf. Dugan* v. *Rank*, 372 U.S. 609, 620-23 (1963); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11 (1949).

Honorable G. Joseph Tauro, *The State of the Judiciary,* 57 Mass. L.Q. 209, 223-25 (1972). The problem is by no means limited to the state judiciary; the federal courts are likewise overtaxed. We do not dispute the general proposition that residents of the Commonwealth might well benefit from more judges and from enlarged court facilities. However, court-managed reshaping of government institutions—not to mention of other courts—is not a task to be undertaken lightly. Whether it is to be undertaken at all depends on "justiciability", a word used to distinguish causes which courts may properly handle from those they may not.

In *Baker* v. *Carr,* 369 U.S. 186, 189 (1962), the Supreme Court defined justiciability as initially turning on "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."

The duty to be identified in the instant case is nothing less than a state's duty under the federal constitution to furnish timely judicial remedies for all its citizens and in all types and classes of litigation. The district court would have to translate the due process clause into formulae and timetables establishing the maximum permissible delay. This would not be easily done. To date, delay as an aspect of due process has been defined in the context of a particular case; a court looks at the effect of delay on the parties, at their diligence, at the nature of the case, and at the interests at stake. The Supreme Court has not quantified even in criminal cases the right to a speedy trial. "We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." *Barker* v. *Wingo,* 407 U.S. 514, 521 (1972). Whatever the extent of any correlative right in

civil cases,[3] it would, as plaintiffs concede, be less than speedy. In any event, whether delay is a violation of due process depends on the individual case. Delay *per se* is not unconstitutional; it may become such only when an injured plaintiff, ready and eager for trial, or a defendant, seeking vindication and himself ready for trial, are denied for too long his day in court. If a five year delay in a civil action reflects simply the parties' utilization of pre-trial discovery or settlement negotiations there is no constitutional violation. To codify the myriad relevant elements into timetables of general application having constitutional force may well be impossible. Posner, *An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. Legal Studies 399, 445-46 (1973).

Formulating the general duty is, moreover, plagued by other considerations such as whether the state's duty to afford a trial within a particular time differs as between classes of civil actions, or whether the constitution permits different timetables in different counties and regions. *See Missouri* v. *Lewis,* 101 U.S. 22, 30-31 (1879); *Kail* v. *Rockefeller,* 275 F. Supp. 937, 942 (E.D.N.Y. 1967) (three-judge court).

If formulating a generalized constitutional duty applicable to the entire state court system is difficult, determining whether and in what respect the duty is being violated is equally so.[4] *See* A.B.A. Approved Standards Relating to

---

[3] The extent of a person's right to have access to the state court remains uncertain. *Boddie* v. *Connecticut,* 401 U.S. 371, 382-83 (1971); *Ortwein* v. *Schwab,* 410 U.S. 656 (1973); *cf. United States* v. *Kras,* 409 U.S. 434 (1973).

[4] The reapportionment case relied upon by plaintiffs, *Mahan* v. *Howell,* 410 U.S. 315 (1973), is inapposite. The duty in the reapportionment field is a readily understandable mathematical ideal. *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 531 (1969). In *Mahan* the Court had no trouble in finding whether the state had deviated from absolute equality; it dealt only with whether such a deviation was justifiable. Moreover, even in the reapportionment area, sufficiently

Speedy Trial § 2.3 (1968); Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies,* in The Courts, The Public and The Law Explosion 29 (H. Jones, ed. 1965). Much of the delay from filing to trial can be attributed to a host of factors: discovery, negotiation, investigation, strategy, and, of course, counsel's engagement on other matters or even procrastination. To extrapolate from court statistics a picture of those cases where inability to obtain a trial has reached due process proportions is difficult.[5]

Most difficult of all, however, would be for the district court to attempt to mold a remedy. *See De Kosenko* v. *New York,* 311 F. Supp. 126, 128 (S.D.N.Y. 1969); *Kail* v. *Rockefeller,* 275 F. Supp. 937 (E.D.N.Y. 1967); *New York State Association of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148, 154 (S.D.N.Y. 1967); *Buchanan* v. *Rhodes,* 249 F. Supp. 860 (N.D. Ohio 1966), *app. dismissed* 385 U.S. 3 (1966); *rev'd on other grounds,* 400 F.2d 882 (6th Cir. 1968), *cert. denied* 393 U.S. 839 (1968). Plaintiffs apparently see the district court as ordering needed manpower and physical resources; but it is not clear that additional judges mean less congestion. The increase of 45 judges in New York over a ten year span had no appreciable effect on the waiting period. Desmond, *Current Problems of State Court Administration,* 65 Colum. L. Rev. 561, 562-63 (1965). Improved facilities may, indeed, merely chan-

---

manageable standards do not always exist to enable the courts to measure breach. The Court recently held that minor deviations do not constitute *prima facie* invidious discrimination, stressing the fact that statistical errors in all census reports as well as shifting population composition mean courts just do not have sufficiently reliable data to ascertain whether a person's vote has been diluted. *Gaffney* v. *Cummings,* 412 U.S. 735, 745-47 (1973).

[5] Plaintiffs presumably would have the court either ignore state provisions which permit the advancement of criminal and civil cases on an *ad hoc* basis or presume their ineffectiveness. M.G.L.A. c. 277 §§ 72, 72A; c. 231 § 59A.

nel more cases into the overburdened state system;[6] the better alternative might be to close the courthouse to certain types of litigation, as occurred when "no-fault" insurance was adopted in Massachusetts.

In any event, a federal judge faced with the awesome task of ordering measures to cut down the waiting period in a state's judiciary could hardly consider merely the augmentation of resources. He would also have to inquire into the administration of the system, its utilization of personnel, the advisability of requiring adoption of techniques such as pre-trial conferences, different calendar arrangements, split trials, and the like, and countless other administrative matters about which books have been written and courses taught, and as to the relative value of which there remains much dispute.

Related to the manageability of relief are other considerations that bear on justiciability. A question is nonjusticiable if it turns on policy determinations outside judicial discretion. *Baker* v. *Carr, supra,* 369 U.S. at 217. In this nation, the financing and, to an important extent, the organization of the judicial branches, federal and state, have been left to the people, through their legislature. While state courts have on rare occasions ordered the provision of assistance from the other branches, when they deemed their very capacity to continue functioning at stake, *e.g., O'Coins, Inc.* v. *Treasurer of County of Worcester,* — Mass. —, 287 N.E.2d 608 (S.J.C. 1972), it would be both unprecedented and unseemly for a federal judge to attempt a reordering of state priorities. One cannot say that such action could never be justified if the constitution should require, but even the serious facts and

[6] The difficulty with predicting the effect of granting the relief plaintiffs request further distinguishes the instant case from other affirmative relief situations. *See, e.g., United States* v. *Montgomery County Bd. of Education,* 395 U.S. 225 (1969); *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972).

circumstances alleged in the complaint do not convince us that the proposed cure would be better than the disease. Some federal courts have, it is true, involved themselves in the adequate financing of state institutions by ordering a state to furnish certain levels of medical and psychiatric care to those involuntarily committed.[7] But in these cases the courts indicated, either implicitly or explicitly, that unless the specific additional services required in order to pass constitutional muster were provided by the state, the facilities in question would be closed. Here, not only is the court unable to articulate a specific standard of "judicial" services which the constitution is thought to require, but any implied threat to close down the state court system if such a standard were not achieved would amount to little more than a quixotic and unwarranted intrusion into an entire branch of state government.

Moreover, one might doubt the wisdom of casting a federal district court in the role of receiver for a state judicial branch. *Cf. Younger* v. *Harris*, 401 U.S. 37, 44-45 (1971). While the state judiciary might appreciate additional resources, it would scarcely welcome the intermeddling with its administration which might follow. The dictates of a federal court might seem to promise easy relief; yet they would more likely frustrate and delay meaningful reform which, in a system so complex, cannot be dictated from outside but must develop democratically from within the state.

The courts always remain open in individual cases to complaints of unconstitutional deprivation through delay. And, of course, principles announced in one case may be

---

[7] *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1967); *Wyatt* v. *Stickney*, 334 F. Supp. 1341 (N.D. Ala. 1971); *contra Burnham* v. *Department of Public Health*, 349 F. Supp. 1335, 1341-43 (N.D. Georgia 1972); see generally Schwitzgebel, *Right to Treatment for the Mentally Disabled*, 8 Harv. Civ. Rights—Civ. Lib. L. Rev. 513 (1973).

such as to control other—possibly many other—later cases. But we decline to ask the federal district court to forego its usual adjudicatory role in favor of the sweeping administrative and legislative functions urged upon us.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 73-1129.

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION ETC., ET AL.,
plaintiffs, appellants,
v.
COMMONWEALTH OF MASSACHUSETTS ET AL.,
defendants, appellees.

JUDGMENT

Entered December 20, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Cohen and Bench.]

APPENDIX C

In the Report of the Massachusetts Joint Legislative Committee,* after noting that existing physical facilities would only permit the legislative authorization and appointment of an additional thirteen judges to the existing complement of forty-five judges in the Superior Court, the resultant effect of such an increment was described as follows:

> "Based on an analysis of the Superior Court's manpower, physical facilities and caseload, and in response to the great weight of evidence showing congestion and unconscionable delays of justice in the Superior Court, the Committee recommends:
>
> 1. The immediate addition of 13 more justices to the Superior Court, bringing its authorized strength to one chief justice and 58 associate justices. Legislation included in Appendix C.
> 2. The immediate expansion of the Superior Court's physical facilities in Suffolk and Barnstable counties. Without additional facilities, the backlog in these counties cannot even be contained at present levels, let alone reduced.
>
> Present experience indicates that the thirteen additional judges would enable the Superior Court to dispose of an additional 21,000 cases per year. If the number of cases remained constant, the backlog would then be eliminated in about five years. If, on the other hand, the number of entries continues to increase at present rates, the backlog and the delays would be reduced to more reasonable levels over a

*See Interim Report of the (Massachusetts) Joint Special Committee Established To Investigate and Study Reform of the Judicial System, House Report No. 5685, April, 1972.

period of eight to ten years, but never eliminated, and more judges would be needed at the end of that time.

Moreover, thirteen is the largest number of additional justices that can be added to the Superior Court within presently existing physical facilities. . . .As noted above, the problem is more acute in Suffolk, Hampden, Barnstable, and Middlesex. Not even the continuous use of every single Superior Court courtroom in those four counties could contain their backlogs at present levels. The only solution to their congestion is the lease or construction of new facilities." (Report of the Joint Legislative Committee, pp. 24-25).

With regard to the often repeated suggestion that the newly adopted "no fault" system for the processing of automobile torts, would substantially ease the court's congestion, the legislative committee found the case to be otherwise, stating:

"Nevertheless, it is not accurate to infer from a drop in entries in one category of cases that the entire backlog will be eliminated.

At the present time, the Court is substituting criminal for civil sessions in order to cope with the increasing number of criminal cases. Even if there were no further civil entries, the civil backlog could not be touched before the criminal cases were dealt with.

Assuming that the sample is representative, no-fault will eliminate 17,000 entries per year, but that decrease would do very little to reduce the congestion in court. The claims which will be eliminated are those for less than $2,000. Such cases are usually remanded to district court for trial and are seldom retried in Superior Court. . . .

Even if the reduction did directly affect the num-

ber of motor tort cases tried, the growth in entries in all other categories has averaged five and one-half percent a year, or presently about 11,000 cases annually. Within a year and a half, the increase in these other categories and in the number of serious motor torts will wipe out any decrease in entries attributable to no-fault, and the backlog will again begin to climb.'' (Ibid, at p. 26).

SUPREME COURT, U. S.

APR 13 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1453

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION et al.,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

ROBERT H. QUINN
Attorney General
WALTER H. MAYO III
Assistant Attorney General
LAWRENCE T. BENCH
Assistant Attorney General
373 State House
Boston, Massachusetts 02133
Attorneys for Respondents

Blanchard Press, Inc., Boston, Mass. — Law Printers

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1453

AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION et al.,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the District of Massachusetts is reported at 358 F. Supp. 953 (D. Mass. 1973), and is set forth in Appendix A to the Petition for a Writ of Certiorari. The opinion of the

United States Court of Appeals for the First Circuit is reported at 488 F.2d 1241 (1st Cir. 1973), and is set forth in Appendix B to the Petition.

Statement of the Case

The petitioners, an unincorporated association of unnamed attorneys and an elderly plaintiff in a civil tort action pending in the Massachusetts Superior Court (Petition p. 16) brought a complaint on behalf of a class consisting of "all persons in the Commonwealth of Massachusetts" (*Ibid.*) against the Commonwealth itself, the General Court or Legislature, and Francis W. Sargent in his capacity as Governor of the Commonwealth (*Id.* p. 15). They alleged that the respondents have failed to provide court facilities, judges, clerical personnel and other facilities to relieve congestion in the state trial courts; that criminal defendants have been unable to obtain speedy trials; that civil litigants are required to wait two years for a trial of their cases; and that the plaintiff attorneys have been deprived of a forum in which to practice their profession (*Id.* at 17). The petitioners claim the actions of the respondents violate their rights under the Sixth and Fourteenth Amendments to the Constitution of the United States (*Id.* at 15). The relief sought was an order to the respondents to provide for additional court facilities, more judges and clerical personnel and to implement such programs with adequate funding (*Id.* at 19).

The respondents moved to dismiss on a number of grounds (Petition at 16-17, fn. 2), and the District Court dismissed the complaint for failure to state a justiciable cause of action and on the ground that the action against the respondents was barred by the Eleventh Amendment (*Id.* at 27-28). The Court of Appeals affirmed on the first ground (*Id.* at 31, 38).

Argument

The Petition Presents No Substantial Question Warranting Further Review By This Court

The decisions of the courts below are clearly correct, and present no reason for the necessity of further review in this Court. They conflict with no decisions of other circuits or with the law of Massachusetts. Indeed, as the Court of Appeals stated with respect to the relief sought by petitioners, "it would be both unprecedented and unseemly for a federal judge to attempt a reordering of state priorities" regarding the organization of the judicial branch (Petition at 35). The ordering of such relief would violate the principles of comity and Federalism cited by this Court as early as the opinion of Mr. Justice Chase in *Calder* v. *Bull,* 3 Dall. 386, 387 (1798), and continuing through *Oregon* v. *Mitchell,* 400 U.S. 112, 124-126 (1970) (Opinion of Black, J.) and *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

By joining as defendants the General Court, which is "empowered to enact legislation," and the Governor, who can approve legislation and appoint judges (Petition at 15-16) the petitioners have recognized that the political branches of the Commonwealth are the only bodies with the authority to restructure or enlarge the judicial branch. The relief sought would violate not only the Tenth Amendment, but also the First Amendment rights of the Governor and legislators to debate and vote upon matters before them without fear of restraint from any judicial tribunal, see *Tenney* v. *Brandhove,* 341 U.S. 367, 372-376 (1951). Moreover, petitioners ask this massive intrusion into areas reserved to the States in a case where the single named plaintiff has failed to allege that he has attempted to utilize state procedures to advance his case (Petition at 34, fn. 5).

and where both courts below were unable to formulate any method for a generalized identification of the duty asserted or a determination of its breach (*Id.* at 20-26, 32-35). See *Baker* v. *Carr*, 369 U.S. 186, 198 (1962); *cf. Gilligan* v. *Morgan*, 413 U.S. 1 (1973).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
WALTER H. MAYO III
Assistant Attorney General
LAWRENCE T. BENCH
Assistant Attorney General
373 State House
Boston, Massachusetts 02133
Attorneys for Respondents